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# In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. [redacted]1162

RICHARD MATHER BOARDMAN, *Petitioner,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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## PETITIONER'S REPLY MEMORANDUM

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# In the Supreme Court of the United States

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## PETITIONER'S REPLY MEMORANDUM

The brief for the United States in opposition to Richard Mather Boardman's petition for a writ of certiorari dismisses several of the petitioner's arguments in a surprisingly perfunctory manner, unbefitting the significance of the basic issues involved. It is true that the asserted right to freedom of religious conscience has clashed many times with the restrictions of the Military Selective Service Act. This conflict between moral conscience and national military "necessity" has all too often been resolved against the conscientious dissenter. But the petitioner asserts that the principles of *stare decisis* do not cement immovable walls of judicial precedent around an asserted constitutional right. One need only to review the courtroom struggle from *Plessy* v. *Ferguson,* (163 U.S. 537

(1896)) through *Brown* v. *Board of Education,* (347 U.S. 483 (1954)), or *Weeks* v. *United States* (232 U.S. 383 (1914)) through *Mapp* v. *Ohio,* (367 U.S. 643 (1961))—to cite two most recent examples—to realize that judicial law can be a creative dynamic force. The creative force of law responds to the pressure of logical systematic developments, both legal and factual. Thus, each case must be reviewed on its facts as well as its law. Certainly it perverts the entire value of judicial appeal to deny all "merit" to the petitioner's claim for review of a prior legal position when such position was founded on a factual situation not now before this Court (Govt. Brief 3, 5).

While *United States* v. *Moylan,* (417 F.2d 1002 (4th Cir.), cert. denied, February 24, 1970, No. 885) referred to in both petitioner and Government briefs, raised some of the same issues as the *Boardman* case, the denial of certiorari in that case should not be considered precedent in this instance. The facts differ in one fundamental respect: the crime in *Moylan* was one of violence and destruction. (Cf. *Sparf and Hansen,* 156 U.S. 51 (1895)).

The Government has not responded to the issue in the instant case that, through his rulings of law during the trial, his comments throughout the trial, and his charge to the jury, the trial judge all but directed the jury to return a verdict of guilty. Such abridgment of the constitutional rights of the criminal defendant to a fair and impartial jury cannot be countenanced. This is especially so in a case of conscientious dissent. "In a case of conscience, the defendant is being prosecuted because he has protested against a policy of the state. The victims of the crime are the persons who are in power at the time and who are making policy for the government." Van Dyke, *The Jury as a Political Institution,* The Center Magazine, 17, 24 (March 1970). In such instance only a jury "unfettered, directly

or indirectly'' stands between the policymakers and the conscientious defendants; they have the power to repudiate the state's policy with a verdict of acquittal.

In a criminal case, each step in the prosecution process is to some extent discretionary. The policeman exercises discretion in the initial arresting process, the grand jury exercises discretion in the indictment process, the trial judge exercises discretion in his courtroom procedure. The jury, too, exercises discretion in the conviction process. These various layers of discretionary procedures are safeguards accorded by our accusatory system to the criminal defendant. When the jury is denied complete and unfettered knowledge of the full extent of its discretionary power, the accused is deprived of one of his safeguards. Additionally, in the criminal process, the jury is able to be merciful. Unlike the policeman, the prosecutor, and the judge, the jury alone will not be required at some later time to answer for its acts.

Jury mercy is not equatable with jury "lawlessness." Govt. Brief 6, citing *United States* v. *Moylan, supra* at 1006. A jury that tempers or mitigates the harshness of a law with respect to one individual after giving due consideration to *all* the *relevant* facts including the field of conscience in which the individual moved, exercises its powers of mercy. A jury that disregards the law without full consideration of the individual and the law acts lawlessly. The distinction is not academic word-play; it is a distinction fundamental to the institution of the jury within our system of law. The bias toward mercy which may be within a given community must be allowed its full range of expression in the same manner as the bias toward the sanctity of the law. Neither one bias nor the other should thwart the freedom of the impartial jury. A judge that states he is the sole arbiter of the law—particularly in

cases of conscience—without in some manner informing the jury of their role as the conscience of the community, inhibits, and indeed, prohibits, this merciful function of the jury.

The time is now ripe for this Court to re-examine the role of the judge and jury in a criminal case involving issues of conscience. The right of the defense to have an impartial and unfettered jury play their role of community conscience must be emphatically asserted. As the "perturbed spirit" of dissenting conscience becomes more apparent within our society, jurors must be made aware of their power to temper the law with mercy with respect to a particular defendant, a particular act of dissent and a particular law. At the very least, the jury must not explicitly be threatened out of using their conscientious discretion. "The argument today is only that the jury has the right to mitigate existing laws and that this right is a basic safeguard against an oppressive or even a merely overly aggressive government." Van Dyke, *The Jury as a Political Institution, supra* at 19. The recent Chicago conspiracy trial witnessed defense counsel and United States District Judge Julius J. Hoffman tangle with this issue from the very beginning of that lengthy trial.

The case of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) emphasizes the important dual nature of the jury's function: the role of the fact-finder and the *politically* responsive role. As Justice White states at 155-156:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to

protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."

The rationale behind this decision and *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) leads to the conclusion that "juries should be encouraged to play a greater role in questioning the government's laws." Van Dyke, *The Jury as a Political Institution, supra* at 22. If "one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system" (*Witherspoon* v. *Illinois, supra* at 519 n.15) then it must be given the authority to reject judicial instructions when they conflict with the values of society.

Collecting material for her book on the recent Spock trial, Jessica Mitford interviewed several of the jurors after the trial. One of these jurors said to her, referring to Judge

Ford's charge in that case: "Of course you wonder if you made the right decision; *but the way the judge charged us, there was no choice.*" Mitford, J., *The Trial of Dr. Spock*, Knopf, 1969 at 234 (emphasis added.) As in the Spock case, Judge Ford's charge in the instant case left the jury no choice. The public function of ultimate discretion was denied the jury by the judge's charge.

It is obvious that the procedural problems of the political trial of conscience are immediate and pressing. The need for plenary review of the action below is indisputable; for that reason and the reasons stated before, the petitioner requests this Court to grant the writ of certiorari and order the judgment below reversed.

Respectfully Submitted

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